

2011 WL 10677690 (Ariz.Super.) (Trial Motion, Memorandum and Affidavit)  
Superior Court of Arizona.  
Pima County

Ernest H. BLACKBURN, Personal Representative of the Estate of Billie  
Jo Blackburn, on behalf of the Estate of Billie Jo Blackburn, Plaintiff,

v.

ENSIGN SABINO, L.L.C., a Nevada limited liability company doing business as Sabino Canyon Rehabilitation and Care Center; Bandera Healthcare, Inc., a California corporation; the Ensign Group, Inc., a Delaware corporation; Ensign Facility Services, Inc., a Nevada corporation; Christine Jones, Administrator; Conerston Hospital of Southeast Arizona, L.L.C., a Delaware limited liability company; Cs Healthcare Arizona, L.L.C., a Delaware limited liability company; Cornestone Healthcare Group Holding, Inc., a Delaware corporation, Christine Hansen, Chief Executive Officer/ Administrator and John Does 1-250; Defendants.

No. C20101401.  
August 15, 2011.

(Oral Argument Requested)

**Defendants Bandera Healthcare, Inc., the Ensign Group, Inc., and  
Ensign Facility Services, Inc.'s Motion for Summary Judgment**

John J. Checkett - 019425, The Checkett Law Firm, PLLC, 10214 North Tatum Boulevard - Suite #a1600, Phoenix, Arizona 85028, (480) 272-9100, (480) 272-9039 - fax, jcheckett@checkett-law.com, Attorneys for Defendants Ensign Sabino, L.L.C. dba Sabino Canyon Rehabilitation and Care Center, Bandera Healthcare, Inc., the Ensign Group, Inc., Ensign Facility Services, Inc. and [Christine Jones](#).

(Assigned to the Honorable Scott Rash).

Pursuant to Ariz. R. Civ. P. 56, Defendants Bandera Healthcare, Inc., The Ensign Group, Inc., and Ensign Facility Services, Inc. (collectively, the "Corporate Defendants") move for summary judgment in their favor and against Ernest H. Blackburn, Personal Representative of the Estate of Billie Jo Blackburn, on behalf of the Estate of Billie Jo Blackburn (collectively, "Plaintiffs"). As shown below, the Corporate Defendants are entitled to summary judgment for the following reasons:

1. None of the Corporate Defendants ever had the requisite caregiver-recipient relationship with Billie Jo Blackburn necessary to support an **elder abuse** claim under Arizona law;
2. None of the Corporate Defendants owed a duty of care to Billie Jo Blackburn;
3. Plaintiffs have failed to disclose any expert witness to testify that any of the Corporate Defendants were negligent or **abused** or neglected Billie Jo Blackburn; and
4. Any alleged negligence by any of the Corporate Defendants did not cause or contribute to Plaintiffs' alleged injuries or damages.

This summary judgment motion is supported by the Memorandum of Points and Authorities below, and Defendants Bandera Healthcare, Inc., The Ensign Group, Inc., and Ensign Facility Services, Inc.'s Statement of Facts in Support of Motion for Summary Judgment ("SOF").

## MEMORANDUM OF POINTS AND AUTHORITIES

### I. THE UNDISPUTED MATERIAL FACTS.

This case involves the care rendered to Billy Jo Blackburn (“Ms. Blackburn”) at Ensign Sabino, LLC dba Sabino Canyon Rehabilitation and Care Center (“Sabino Canyon”) from approximately March 5, 2008 to April 4, 2008 (SOF ¶ 1.) In the First Amended Complaint, Plaintiffs allege violation of the Adult Protective Services Act (“APSA”). (SOF ¶ 2.) Plaintiffs claim that Ms. Blackburn incurred injury at Sabino Canyon due to the alleged negligence of the nurses and other employees responsible for her care. (SOF ¶ 3.) However, Plaintiffs have not asserted any expert opinion against Bandera Healthcare, Inc., The Ensign Group, Inc., and Ensign Facility Services, Inc. (collectively, the “Corporate Defendants”). (SOF ¶ 5.) The only expert criticisms are against the Sabino Canyon facility and its staff. (SOF ¶ 5.)

The Corporate Defendants do not engage in, nor are any involved in, hiring, terminating, evaluating, directing, authorizing or ratifying the conduct of the staff working at Sabino Canyon. (SOF ¶ 6.) The Corporate Defendants do not determine a budget for the staffing level at Sabino Canyon, nor do they direct, manage or control the daily operation of Sabino Canyon. (SOF ¶ 7.) The Corporate Defendants have not been involved in rendering care and treatment to Sabino Canyon's residents, including Ms. Blackburn. (SOF ¶ 8.) The Corporate Defendants did not enter into any contract with Ms. Blackburn or her representative. (SOF ¶ 10.) Finally, at no time did the Corporate Defendants assume any responsibility for providing or rendering residential care to Ms. Blackburn. (SOF ¶ 9.)

### II. LEGAL ARGUMENT

#### A. Ensign Cannot Be Held Liable For Elder Abuse Or Neglect Pursuant To A.R.S. § 46-455.

The Arizona Supreme Court examined the scope and applicability of the APSA in *McGill v. Albrecht*, 203 Ariz. 525, 57 P.3d 384 (2002). The Court in *McGill* held that in order for there to be an actionable claim for the **abuse** or neglect of an incapacitated or vulnerable adult pursuant to the APSA, the negligent act or acts at issue:

- (1) must arise from the relationship of **caregiver and recipient**;
- (2) must be **closely connected** to that relationship;
- (3) must be linked to the service the **caregiver** undertook because of the recipient's incapacity; and
- (4) must be related to the problem or problems that caused the incapacity.

See *McGill*, 203 Ariz. at 530, 57 P.3d at 389 (emphasis added).

The APSA was further analyzed in *Corbett v. Manorcare of America*, 213 Ariz. 618, 146 P.3d 1027 (App. 2006). While the *Corbett* Court held that a direct patient-caregiver relationship was not a prerequisite for liability under the APSA, the Court upheld the dismissal of the defendants who were employed by the parent company, but had never met the plaintiff and were not even in the state during the plaintiff's admission to the facility. The Court focused on the plain wording of the statute which allows “[a] vulnerable adult whose life or health... has been endangered or injured by neglect, **abuse** or exploitation” to “file an action... against any person or enterprise that has been *employed to provide care*... for having caused or permitted such conduct.” A.R.S. § 46-455(B) (emphasis added); *Corbett*, 213 Ariz. at 628, 146 P.3d at 1037.

In the case at hand, the Corporate Defendants do not engage in, nor are any involved in, hiring, terminating, evaluating, directing, authorizing, or ratifying the conduct of the staff working at Sabino Canyon. (SOF ¶ 6.) The Corporate Defendants do not

determine a budget for the staffing level of Sabino Canyon, nor do they direct, manage or control the daily operation of Sabino Canyon. (SOF ¶ 7.) The Corporate Defendants have not been involved in rendering care and treatment to Sabino Canyon's residents, including Ms. Blackburn. (SOF ¶ 8.) None of the Corporate Defendants entered into any contract with Ms. Blackburn or her representative. (SOF ¶ 10.)

The Corporate Defendants did not provide, and were not otherwise involved in and had no duty to provide or be involved in, care services of Ms. Blackburn. The Corporate Defendants were clearly not employed to provide any medical care or services to Ms. Blackburn, and none of the Corporate Defendants were a "caregiver" as defined in the *McGill* test. As such, the Corporate Defendants were never in the position to cause or permit the alleged **abuse** or neglect to occur as alleged in Plaintiffs First Amended Complaint. Accordingly, the Corporate Defendants are entitled to summary judgment on Plaintiffs' **elder abuse** claim.

## **B. The Corporate Defendants Did Not Owe A Duty To Ms. Blackburn**

To the extent that Plaintiffs' action is based on alleged negligence causing or contributing to Ms. Blackburn's injuries, Plaintiffs must establish duty, breach of the standard of care, proximate cause, and damages. *Nicolleti v. Westcor, Inc.*, 131 Ariz. 140, 639 P.2d 330 (1982). The threshold issue of whether the defendant owed any duty of care to the plaintiff is usually decided by the court as a matter of law. *See Hamman v. Maricopa*, 161 Ariz. 58, 61, 775 P.2d 1122, 1125 (1989). Absent a duty recognized by law, one cannot be held liable for negligent conduct. *See, e.g., West v. Soto*, 85 Ariz. 255, 261, 336 P.2d 153, 156 (1959); *Hafner v. Beck*, 185 Ariz. 389, 391, 916 P.2d 1105, 1107 (App. 1996). Ordinarily, a relationship between a healthcare provider and a patient is necessary before tort liability can be imposed for negligent diagnosis or care. *Hafner v. Beck*, 185 Ariz. 389, 391, 916 P.2d 1105, 1107 (App. 1996). Ensign was under no such duty.

The basis for Plaintiffs' negligence claim is extraordinarily vague at best. Plaintiffs have never disclosed specifically what any of the Corporate Defendants allegedly did or failed to do that justifies their inclusion as a defendant in this litigation. (SOF ¶ 5.) Plaintiffs' First Amended Complaint alleges generally that the Corporate Defendants "owned, operated, and/or managed" Sabino Canyon. (SOF ¶ 4.) Plaintiffs' First Amended Complaint also contends that the Corporate Defendants "participated in, authorized, and/or directed the conduct of" Sabino Canyon. (SOF ¶ 4.) These claims are unsubstantiated and false. There is not, and has never been, any evidence to support these allegations against any of the Corporate Defendants. The undisputed facts demonstrate that the Corporate Defendants never had anything whatsoever to do with the care provided to Ms. Blackburn or the daily operation of Sabino Canyon. (SOF ¶¶ 6-10.) Thus, Plaintiffs have failed to offer any facts or expert opinion to indicate there was absolutely any relationship between Ms. Blackburn and any of the Corporate Defendants. Therefore, as a matter of law, no duty to Ms. Blackburn existed.

Because none of the Corporate Defendants ever entered into a caregiver-recipient, fiduciary, or other relationship with Ms. Blackburn, provided no services to Ms. Blackburn, and had absolutely no contact with Ms. Blackburn during her residency at Sabino Canyon, the Corporate Defendants did not owe Ms. Blackburn any duty or obligation under Arizona law.

## **C. Plaintiffs Have Failed To Disclose Expert Testimony Necessary To Support Their Claims Against the Corporate Defendants.**

Plaintiffs disclosed their standard of care and causation expert witnesses against Defendants on January 31, 2011. (SOF ¶ 5.) Notably absent from the detailed opinions of Plaintiffs' expert witnesses is any mention of any of the Corporate Defendants. None of the Corporate Defendants are referenced anywhere in the seven-page affidavit of Plaintiffs' standard of care expert witness. (SOF ¶ 5.) Nor are any of the Corporate Defendants referenced anywhere in the six-page affidavit of Plaintiffs' causation expert witness. (SOF ¶ 5.)

There is no explanation of what any of the Corporate Defendants allegedly did, or failed to do, that forms the basis for Plaintiffs' **abuse** and neglect or negligence-based claim against them. Since Plaintiff's action is premised upon alleged medical negligence,

well-established Arizona law requires Plaintiff to support their claims with expert testimony. See *Gurr v. Wilcutt*, 146 Ariz. 575, 581, 707 P.2d 971 (App. 1985). Plaintiffs have failed to do so.

**D. Plaintiffs Cannot Establish That Any Act Or Omission By Any Of the Corporate Defendants Caused Or Contributed To Ms. Blackburn's Injuries or Damages.**

Even if Plaintiffs could establish that the Corporate Defendants breached a duty owed to Ms. Blackburn, which the Corporate Defendants clearly dispute, Plaintiffs' claims must fail. Under Arizona law, proximate cause is by statute an element of every medical negligence action, regardless of the theory of the case. See § A.R.S. 12-563; *Valencia v. U.S.*, 819 F. Supp. 1446, 1464 (D. Ariz. 1993). In order to prove proximate cause, a defendant's negligent act has to be a substantial factor in producing the plaintiff's injury. *Barrett v. Harris*, 207 Ariz. 374, 381, 86 P.3d 954, 961 (App. 2004). A plaintiff must prove proximate cause by demonstrating a natural and continuous sequence of events stemming from the defendant's act or omission, unbroken by any efficient intervening cause, and without which the injury would not have occurred. *Id.* at 387, 86 P.3d at 958.

Plaintiffs' allegations in this case involve the care of Ms. Blackburn as a resident of Sabino Canyon. (SOF ¶ 1.) Plaintiffs claim that Ms. Blackburn incurred injuries at Sabino Canyon due to the alleged negligence of the nurses and other employees responsible for her care. (SOF 13.) Since none of the Corporate Defendants provided any medical care or services to Ms. Blackburn, none of the Corporate Defendants were ever in the position to cause or permit the alleged **abuse** or neglect to occur as alleged in Plaintiffs' Complaint. (SOF ¶¶ 6-10.) None of the Corporate defendants were responsible for the firing, training, evaluating, or supervising of any nurses, caregivers, or employees working at Sabino Canyon who were charged with the care of Ms. Blackburn at Sabino Canyon. (SOF ¶ 6.) Further, none of Plaintiffs' experts has opined that any alleged act or omission by any of the Corporate Defendants caused or contributed to Ms. Blackburn's alleged injuries or damages. (SOF ¶ 5.) Therefore, Plaintiffs have failed to prove the required element of causation necessary to support their claims against the corporate Defendants.

**III. CONCLUSION**

Plaintiffs have failed to offer any facts or expert opinions to support a cause of action for **abuse** or neglect pursuant to A.R.S. § 46-455. None of the Corporate Defendants ever entered into a caregiver-recipient relationship with Ms. Blackburn, and were not employed to, and did not provide any medical care or services to Ms. Blackburn, owned her no duty or obligation under Arizona law, and did not in any way cause or contribute to her alleged injuries or damages. Accordingly, the Corporate Defendants respectively request this Court enter summary judgment in their favor and dismiss Plaintiffs' claims against them.

DATED this 12<sup>th</sup> day of August, 2011.

**THE CHECKETT LAW FIRM, PLLC**

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